

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. BURTON, President Pro Tempore of the
California State Senate, individually and on behalf of
the **California State Senate**; **ROBERT M. HERTZBERG**,
Speaker of the California State Assembly, individually and
on behalf of the **California State Assembly**; and the
CITY OF OAKLAND, a Charter City and Municipal
Corporation, individually and on behalf of its residents,

CA No. 01-70812

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Original Proceeding in the Court of Appeals
Pursuant to 16 U.S.C. § 8251(b) and 28 U.S.C. § 1561(a)

**BRIEF OF AMICUS CURIAE MONTANA ATTORNEY
GENERAL MIKE McGRATH, SUPPORTING PETITIONERS,
JOHN L. BURTON, et al., IN SUPPORT OF PETITION
FOR REHEARING EN BANC**

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I. INTEREST OF AMICUS CURIAE AND JURISDICTIONAL STATEMENT

Montana Attorney General, Mike McGrath, files this brief of an amicus curiae pursuant to Fed. R. App. P. 29(a) in support of Petitioners' request for rehearing en banc on their emergency petition for writ of mandamus filed on May 22, 2001.

The United States Court of Appeals for the Ninth Circuit holds exclusive jurisdiction to entertain the original petition pursuant to § 313(b) of the Federal Power Act ("FPA"). More specifically, § 313(b) of the FPA vests the Court of Appeals with exclusive jurisdiction to review actions and orders undertaken by FERC. 16 U.S.C. § 8251(b). Section 313(b) of the FPA, in conjunction with the All Writs Act (28 U.S.C. § 1651(a), provides this Court with jurisdiction to hear claims for relief concerning FERC's action or inaction. See California Power Exchange Corp. v. F.E.R.C., 245 F.3d 1110, 1119 (9th Cir. 2001) ("CalPX").

The Administrative Procedure Act provides an alternative independent ground for subject matter jurisdiction. The Administrative Procedure Act directs that a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed. . . ." 5 U.S.C. § 706(1); see also Independence Mining Company v. Babbitt, 105 F.3d 502, 511 (9th Cir.

1997) ("Judicial review of an agency's action under section 706(1) for alleged delay has been deemed an exception to the final agency decision requirement"). FERC's refusal or failure to ensure a "just and reasonable" rate is causing irreparable harm to human health, safety and welfare throughout the state of California and likely will have a similarly deleterious effect throughout the state of Montana. FERC's delay is unreasonable under the circumstances present.

Under Montana law, the Attorney General has the common-law authority to appear in all actions affecting the public interest. State ex rel. Olsen v. Public Service Commission, 129 Mont. 105, 115, 283 P.2d 594, 599 (1955). FERC's arbitrary and unreasonable failure to set clear standards for assessing whether wholesale electricity rates are "just and reasonable" and to determine whether "market power" is being exercised by wholesale power sellers have denied Due Process and Equal Protection to industrial electricity users in Montana and likely will cause such harm in the future to consumer electricity users in Montana. See U.S. Const., amend. V; 16 U.S.C. §§ 824d(a), 824e. This Court must grant immediate relief to cure this continuing constitutional violation. See Bush v. Gore, ___ U.S. ___, 121 S. Ct. 525, 530-32 (2000).

II. ISSUES PRESENTED

Attorney General McGrath joins in the issues originally presented as set forth in Petitioners May 22, 2001 petition for writ of mandamus and as set forth in Petitioners' June 8, 2001 petition for rehearing en banc.

III. STATEMENT OF FACTS

Attorney General McGrath joins in the statement of facts originally set forth by Petitioners May 22, 2001 petition and provides the following supplementary facts reflecting the current situation in the state of Montana.

In 1997, the Montana Legislature passed the Electric Utility Industry Restructuring and Customer Choice Act. Mont. Code Ann., tit. 69, ch. 8, pt. 1 et seq. The law required the largest public utility in Montana to file a transition plan to restructure its utility business to allow customer choice of electricity supply, separating the generation function from the distribution and transmission functions. Mont. Code Ann. § 69-8-204. In effect, Montana became one of the first states in the country after California to start down the path of deregulating its electricity rates.

The law further established the transition period during which the Montana Public Service Commission (hereinafter "PSC") would gradually

cede regulatory authority over electricity sales in the state of Montana. Mont. Code Ann. § 69-8-202. The transition period for industrial power users ended on July 1, 2000, and the transition period for consumer users originally was set to end on July 1, 2002. Id. at § 201(1)(b). Pursuant to § 69-8-201(2), however, the PSC determined in December 2000, that no workable competition in the electricity market would exist for the foreseeable future and extended the transition period to June 30, 2004. Montana Public Service Commission, Order No. 6314, and Docket No. D2000.10.177, pages 7-13.¹

The effects of electricity deregulation on industrial users in Montana has been nothing short of catastrophic. Most industrial users were paying \$25 to \$30 per megawatt hour (hereinafter "mwh") before deregulation went into effect. Hearing on H. Bill 474 Before Senate Committee on Energy and Telecommunications, 57th Leg., Reg. Sess. (Mont. 2001) (statement of Michael Uda, Attorney, Ash Grove Cement Company). The same industrial users currently are paying anywhere from \$50 per mwh for longer-range electricity contracts to more than \$300 per mwh on the spot market. Id.

¹ H. Bill 474 passed by the Montana Legislature (codified at Mont. Code Ann. § 69-8-103) extended the transition period for consumer customers until July 1, 2007. Regardless of the final date, it is clear that Montana's consumer power users will face similar market forces.

Many of these companies operate their facilities around-the-clock. As a result, for every megawatt of power, they consume 8,760 megawatt hours per year. See Mike Dennison, Montana Industrials Staggering, Great Falls Tribune, May 27, 2001 at A1.

More specifically, the Columbia Falls Aluminum Company, which operates an aluminum manufacturing facility in Columbia Falls, Montana, employed 585 workers at full capacity. Dennison at A1. High electricity prices have forced the company to suspend its operations until October 2002. Id. Montana Resources, Inc., a copper mining entity, suspended operations at its Butte, Montana copper mine in June 2000 due to high electricity prices. Id. The closing caused 320 employees to lose their jobs. Id.

Likewise, ASARCO, a lead smelter located in East Helena, Montana shut down its operations due, in part, to high energy prices. Hearing on H. Bill 474 Before Senate Committee on Energy and Telecommunications , 57th Leg., Reg. Sess. (Mont. 2001) (statement of John Shaw, Plant Manager, ASARCO). Numerous other Montana businesses, such as Ash Grove Cement Company, were forced to suspend operations for various periods of time due to their inability to obtain affordable power. Id. (statement of Tom

Daubert, Ash Grove Cement Company). More and more Montana businesses will face similar situations in the coming months as their existing power contracts come to an end. At that point, these businesses will be forced to seek power contracts in the current unregulated environment in which prices have risen between 100 percent to 1,000 percent. Id. (statement of Michael Uda). To date, these Montana businesses have survived due to the lower prices contained in their existing contracts, by resorting to layoffs, suspensions, and partial operations, and various other stop-gap measures designed to reduce power consumption.

The devastating effects of these high energy prices in Montana has not been limited to industrial users. Agriculture faces a similar crisis. For example, based on current commodity prices, producers forced to pay these exorbitant electricity prices for irrigation will find themselves in a situation where they will be losing up to \$27 for each acre of irrigated wheat that they produce and up to \$93 for each acre of irrigated barley that they produce. Id. (statement of Barry Hederich, farmer). Throughout this period, Montana's electric power providers have reaped fabulous profits. According to one report, Montana's largest electric power provider earned a net income

of nearly \$70 million for the last quarter of the year 2000. Id. (statement of Greg Stricker, Montana Resources, Inc.).

IV. LEGAL ARGUMENT

A. The Federal Power Act Imposes Upon FERC a Clear and Certain Duty of Act.

This Court normally applies a three-part test to determine whether mandamus is appropriate. This three-part test includes the following requirements: (1) Petitioners must show a clear and certain claim; (2) the duty Petitioners seek to have enforced must be ministerial in nature, and therefore, so plainly prescribed as to be free from doubt; and (3) no other adequate remedy must be available for Petitioners. Oregon Natural Resource Council v. Harrell, 52 F.3d 1499, 1508 (9th Cir. 1995) (citation omitted).

The Federal Power Act (hereinafter "FPA") imposes upon FERC a duty to ensure just and reasonable rates. 16 U.S.C. § 824d (b). The FPA further mandates that when FERC determines that a rate is "unjust, unreasonable, unduly discriminatory or preferential," FERC shall determine a just and reasonable rate. 16 U.S.C. § 824e(a) (emphasis added). As seen from the plain language of the statute, the FPA limits FERC's discretion to

act, or not act, once FERC has determined that a rate is unjust or unreasonable . The mandatory nature of the FPA, as evidenced by the term "shall," directs FERC to act in such situations. See 16 U.S.C. § 824e(a).

Petitioners have stated a clear and certain claim in the present case. The shocking increase in power prices leads to no other conclusion than that such rates are "unjust, unreasonable, unduly discriminatory or preferential." In fact, FERC previously has found, in its order of November 1, 2000, that under certain conditions, short-term wholesale power rates in the California market were "unjust and unreasonable" within the meaning of the FPA. 93 F.E.R.C. ¶ 61,121 at 61,349, 61,366, 61,370. FERC refused to act at that time, however, on the grounds that it had not yet made "findings about whether particular rates charged by particular sellers" were unjust and unreasonable. 93 F.E.R.C. ¶ 61,294 at 61,998.² The exorbitant prices for electric power continue. Under these circumstances, therefore, FERC must act as set forth by the plain terms of the FPA. The clear and certain nature,

² FERC's action was taken in response to a complaint filed by San Diego Gas & Electric Company, a supplier of retail power subject to regulation by the California Public Utilities Commission, against wholesale power suppliers.

namely the shocking increases in power prices, satisfies the first prong of the test for mandamus relief.

Once FERC has determined that the rates being charged for electricity are unjust and unreasonable, the FPA imposes a clear duty on FERC to act. This duty requires FERC to set rates for electricity that are just and reasonable. The alleged structural defect in the California power market, namely the over reliance upon the spot market, that excused FERC from setting just and reasonable rates has been removed. CalPX, 245 F.3d at 1120-21. FERC's statutorily-imposed duty to act to set just and reasonable rates pursuant to the FPA represents a ministerial duty so plainly prescribed as to be free from doubt.

In this regard, it is important to note that Petitioners do not demand that the Court order FERC to set electricity rates at some specific, pre-determined level. Petition for Rehearing En Banc, at 2. Instead, Petitioners merely request that the Court direct FERC to exercise its statutorily-mandated duty of determining just and reasonable rates for electric power in light of the present circumstances. 16 U.S.C. § 824e(a).

FERC's failure to act to ensure just and reasonable electricity rates leaves the rate paying public no remedy other than a petition for writ of

mandamus to this Court. Monetary damages alone will not be sufficient in this case. Each of the displaced workers in Montana discussed in the Statement of Facts represents a family. These families have mortgages, bills to pay, and obligations that cannot be deferred until such time as the Court decides upon final resolution of this matter that FERC abrogated its statutory duty to set just and reasonable rates for electricity. The Court cannot turn back the clock and restore those workers to their former lives simply by providing electricity refund checks to their employers. The Court must act now to provide any meaningful relief in this case.

B. FERC's Unreasonable Delay in Setting Electricity Rates That Are Just and Reasonable Threatens the Health, Safety, and Welfare of the Rate-Paying Public.

The court's holding in Telecomm Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) ("T.R.A.C.") provided guidance by determining the reasonableness of an agency's delay in taking action. T.R.A.C., 750 F.2d at 80. This Court adopted the T.R.A.C. guidelines in Independence Mining Co. v. Babbitt, 105 F.3d 502, 507 (9th Cir. 1997). Since 1998, FERC has known that prices charged for electric power in California are unjust and unreasonable. California now faces its fourth year

of unjust and unreasonable prices for electric power and yet FERC refuses to set rates that are just and reasonable as required under the FPA.

As noted by the Court in CalPX, to be deemed unreasonable an agency's delay in acting should involve "delays of years, not months." CalPX, 245 F.3d at 1125. See, e.g., Potomac Elec. Power Company v. ICC, 702 F.2d 1026, 1035 (D.C. Cir. 1983) (eight-year delay unreasonable); MCI Telecommunications Corp. v. FCC, 627 F.2d 322, 324-25 (D.C. Cir. 1980) (four-year delay unreasonable); cf. T.R.A.C., 750 F.2d at 81 (delays for approximately five years and two years by the FCC did not warrant mandamus, or prompt the court to retain jurisdiction over proceedings).

As discussed, FERC's failure to act by setting rates that are just and reasonable now stretches into its fourth year for California. In the words of FERC Commissioner William L. Massey, the electricity prices have "had a breathtaking and staggering effect on the western economy and there is no end in sight." 95 FERC ¶ 561,115. Industrial users in Montana face their second year of unjust and unreasonably high prices for electric power. Montana's largest businesses already have started to close. Dennison, supra at A1. The damage will be incalculable as "the economic carnage" spreads throughout the West. 95 FERC ¶ 561,115. Montana's consumer customers

will face similarly unjust and unreasonable prices unless FERC acts as the FPA directs it to do.

The FPA sets forth an elaborate set of procedures designed to ensure that electricity rates are just and reasonable. FERC's failure to abide by the clear mandate of the FPA to set just and reasonable rates for electricity represents arbitrary and unreasonable conduct. Petitioners have satisfied the three-part test for mandamus set forth under Oregon National Resource Council. Petitioners have shown that they have a clear and certain claim; Petitioners have shown that FERC's duty to set just and reasonable electricity rates is mandatory; and Petitioners have no other adequate remedy available. Moreover, Petitioners have established that FERC's delay in acting to set just and reasonable rates is unreasonable in light of the dire threats to health, safety, and welfare posed by the exorbitant electricity prices. T.R.A.C., 750 F.2d at 80.

CONCLUSION

For the reasons set forth in Petitioners' original emergency petition for writ of mandamus, Petitioners' petition for rehearing en banc, and the reasons set forth above, Attorney General McGrath files this brief of an amicus

curiae in support of Petitioners. In the event the Court hears the petition en banc and grants the writ of mandamus, Attorney General McGrath respectfully requests this Court to retain jurisdiction over the matter to ensure that FERC acts in accordance with its duties set forth in the Federal Power Act.

Respectfully submitted this 11th day of June, 2001.

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STATEMENT OF RELATED CASES

The Appellee is unaware of any related cases pending before this Court.

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and accurate copies of the foregoing Brief of Amicus Curiae State of Montana to be mailed to:

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) and CIRCUIT RULE 32-1 FOR CASE NUMBER 01-70812

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1,
the attached answering brief is

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